United States Department of Energy
Office of Hearings and Appeals

In the Matter of Sheldon I. Cohen	)	
	)	
Filing Date: October 4, 2017	)	Case No.: FIA-17-0033
	)	
_____	)	

Issued: November 2, 2017

Decision and Order

On October 4, 2017, Mr. Sheldon I. Cohen (Appellant) appealed a determination issued by the Department of Energy's (DOE) Office of Public Information (OPI) on September 12, 2017 (Request No. HQ-2017-01275-F). In its determination, OPI responded to a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OPI released one document but redacted it in part pursuant to Exemption 6 of the FOIA. The Appellant argues that some of the information that OPI redacted should not have been withheld. As explained below, we have determined that the Appeal should be granted in part.

I. Background

In addition to deciding FOIA appeals, this office, the Office of Hearings and Appeals (OHA), handles a number of other quasi-judicial matters within its jurisdiction. These include holding hearings and issuing decisions on the eligibility of DOE employees and contractor employees for access authorization, or a security clearance, pursuant to the DOE regulations set forth at 10 C.F.R. Part 710. The regulations provide that after an OHA Administrative Judge has issued a decision, the parties may seek review of that decision by an Appeal Panel. 10 C.F.R. § 710.28.

The Appellant filed a FOIA request for the Appeal Panel decision issued on a certain OHA personnel security case, OHA Case No. PSH-15-0063. Request from Appellant to the DOE (June 16, 2017) at 1. OPI assigned the request to the Office of Environment, Health, Safety and Security (EHSS), which convenes the Appeal Panel pursuant to 10 C.F.R. § 710.29. EHSS located one responsive record. Determination Letter from Alexander C. Morris, OPI, to Appellant (September 12, 2017) at 1. OPI provided the record to the Appellant but redacted portions of it pursuant to Exemption 6 of the FOIA. *Id*. In its determination letter, OPI indicated that the redacted information consists of a name, a home address, and the DOE's decision regarding the eligibility of the relevant individual (Individual) for access authorization. *Id*.

In his Appeal, the Appellant does not challenge OPI's decision to withhold the Individual's name and home address under Exemption 6. Appeal from Appellant to Director, OHA (September 27, 2017) at 1. However, the Appellant argues that OPI should not have withheld the portion of the document in which the Appeal Panel states its decision. *Id*. In support of his argument, the Appellant contends that this redacted material does not meet the standard for withholding under Exemption 6. He further argues that the FOIA, 5 U.S.C. § 552(a)(2)(A), requires the DOE to proactively make available its Appeal Panel decisions.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. It also, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine exemptions are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

A. Exemption 6

Exemption 6 of the FOIA shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*). In determining whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine if a substantial privacy interest would be compromised by the disclosure of the information. *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (*Horner*); *see also Ripskis v. Dep't of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If the agency cannot find a substantial privacy interest, the information may not be withheld. *Horner*, 879 F.2d at 874. Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information would further the public interest by shedding light on the operations and activities of the government. *Id.*; *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 773 (1989) (*Reporters Committee*). Lastly, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *Horner*, 879 F.2d at 874.

As an initial matter, we review whether the record meets Exemption 6's threshold requirement that it fall into the category of "personnel and medical files and similar files." Courts have interpreted the term "similar files," and the threshold requirement itself, to encompass any information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602. Because the requested record regards a particular individual, this threshold requirement is met. The Appellant nevertheless contends that the threshold requirement is not satisfied and that the record does not fall into the category of "similar files," or, presumably, of "personnel files." For support, he states that there is a presumption in favor of disclosure under Exemption 6, and cites precedent including

Multi AG Media LLC v. Dep't of Agric., 515 F.3d 1224, 1227 (D.C. Cir. 2008) (*Multi AG Media*) This argument, however, does not address the broad way in which courts have interpreted Exemption 6's threshold requirement. Indeed, in *Multi AG Media*, the D.C. Circuit Court used the same broad interpretation of "similar files" that the Supreme Court adopted in *Washington Post*. *See id*. at 1228-29 (citing *Washington Post* and concluding that business records containing personal financial information meet Exemption 6's threshold requirement). We therefore find that the Appellant's argument is without merit.

We next consider whether a significant privacy interest would be compromised by disclosure of the requested information. The material sought by the Appellant is the Appeal Panel decision related to OHA Case No. PSH-15-0063. The withheld material, which we reviewed, consists of three sentences that briefly describe the Appeal Panel's review process and announce its decision. Although this withheld material does not state the Individual's name or contain any details that would identify the Individual, we find that a substantial privacy interest would be compromised if this information were released.

In conducting an Exemption 6 analysis, courts look beyond the face of the document to examine whether the requested material, in combination with other available information, could lead to an invasion of privacy. *See*, *e.g.*, *ACLU v. Dep't of Justice*, 655 F.3d 1, 6-7 (D.C. Circ. 2011) (finding a privacy interest in docket information on certain types of requested criminal cases because docket information could be used to look up underlying cases in public records). In the instant matter, there may be one or more individuals, including witnesses and attorneys involved in Case No. PSH-15-0063, who know the identity of the Individual as well as the case number. A public release of the withheld information, if provided as a response to this request, therefore could reveal to one or more of the people who know the identity of the Individual in Case No. PSH-15-0063 whether that Individual received a security clearance. *See*, *e.g.*, *Dep't of Air Force v. Rose*, 425 U.S. 352, 381 (1976) (*Rose*) (acknowledging non-trivial privacy concerns arising from fact that former colleagues and instructors "in the know" might identify individuals in summaries of Air Force Academy disciplinary proceedings.) We regard any decision about whether a particular person should receive a security clearance as information that is personal in nature and that potentially could cause injury and embarrassment to that person. Therefore, we find that a public release of the withheld material would compromise a substantial privacy interest.

We next consider whether release of the information would further the public interest by shedding light on the operations and activities of government. The Appellant argues that release of the letter would serve the public interest "by both providing an understanding of administrative past practice and guidance to the public [as] to what to expect in appeals in other similar cases in the future." Appeal at 2. We agree that there is some public interest in shedding light on the format of the letter that the Appeal Panel customarily sends when issuing its decisions. Nevertheless, this public interest has already been served by release of the redacted document. It could be further served by releasing segregable portions of the record, which in the analysis below we find necessary. In addition, the withheld material does not describe the reasons for the Appeal Panel's decision, which significantly lowers the value of the material as a predictor of outcomes in future cases.[1]

[1] Unlike decisions by OHA Administrative Judges, which must include "specific findings based upon the record" and "be fully supported by a statement of reasons," *see* 10 C.F.R. § 710.27(c), Part 710 contains no requirement that Appeal Panel decisions contain such findings. *See* 10 C.F.R. § 710.29(f)-(g).

Moreover, taking into account how the Supreme Court has interpreted Exemption 6, we do not regard this request as one in which the public interest should be given much weight. In *Rose*, the Supreme Court found that the Air Force could not use Exemption 6 to withhold summaries of disciplinary proceedings at the Air Force Academy; it concluded that the Air Force should release the summaries, for in camera inspection with names and identifying information redacted. *Rose*, 425 U.S. at 381. In *Reporters Committee*, explaining its decision in *Rose*, the Supreme Court stated that "[i]f, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in *Rose* would have been inapplicable." *Reporters Committee*, 489 U.S. at 774. In the instant matter, the requested records resemble those sought in the Supreme Court's hypothetical in *Reporters Committee*. The Appellant has not filed a request for the types of records that would enable him to understand the activities of the Appeal Panel. Rather, the Appellant has filed a request for the decision in a single case regarding one individual. Accordingly, it does not appear that the Appellant's request is designed to shed light on the operations and activities of the government or that it would, in fact, shed much light.

In the final step of our analysis, we conduct a balancing test. Here, we give significant weight to the privacy interests involved due to the risk that release of the material could reveal whether a particular person, the Individual, received a security clearance. We give less weight to the public interest for the reasons explained above. Given the significant privacy interests at stake and the minimal public interest, we find that release of the material at issue would constitute a clearly unwarranted invasion of privacy.

The Appellant cites *Reporters Committee* for the conclusion that the requester's identity "has no bearing on the merits of his or her FOIA request." *Id.* at 771; Appeal at 2. We do not reach our decision based on the requester's identity, but based on the request itself. Essentially, this appears to be a request for information about the Individual. If the Appellant had named the Individual in the request, we likely would not have released this material. *See Reporters Committee*, 489 U.S. 774-75 ("Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.") We cannot reach a different result simply because the Appellant has identified the Individual by a case number rather than by name.

The Appellant's final argument is that the DOE should release the Appeal Decision pursuant to the proactive disclosure provision of the FOIA, 5 U.S.C. § 552(a)(2)(A). Appeal at 3. That provision requires agencies to "make available for public inspection in electronic format final opinions . . . made in the adjudication of cases." 5 U.S.C. § 552(a)(6)(A). We need not reach this argument because it addresses matters beyond our jurisdiction. OHA has authority to issue decisions on denials of requests for records. 10 C.F.R. § 1004.8(a). We do not interpret our authority to include the ability to order the DOE to proactively disclose a type of record.

B. Public Interest

DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and that disclosure is in the public interest. 10 C.F.R. § 1004.1. Because the analysis of the applicability of Exemption 6 already considers the public interest in release of the Exemption 6 withheld material, we need not make a separate public interest determination regarding discretionary release of the material at issue.

C. Segregable Material

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). After reviewing the withheld material in the body of the letter, we find that there is text that could be released without revealing information that is protected by Exemption 6. We therefore will remand this matter to OPI so that it can review whether to segregate and release additional material.

III. Order

It is hereby ordered that the Appeal filed on October 4, 2017, by the Sheldon I. Cohen, Case No. FIA-17-0033, is granted in part.

This matter is hereby remanded to the Department of Energy's Office of Public Information, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
Email: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 2, 2017